

Comptroller of the Currency, Treasury

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dividend constitutes a reduction in capital subject to 12 U.S.C. 59 and § 5.46.

§ 5.64 Earnings limitation under 12 U.S.C. 60.

(a) *Transfers to capital surplus.* Subject to the restrictions in 12 U.S.C. 56 and this subpart, the directors of a national bank may declare and pay dividends as frequently and of such amount of undivided profits as they judge prudent. However, a national bank may not declare a dividend unless capital surplus equals or exceeds the capital stock of the bank, except:

(1) In the case of an annual dividend, the bank may declare a dividend if the bank transfers 10 percent of its net income for the preceding four quarters to capital surplus; or

(2) In the case of a quarterly or semi-annual dividend, or any other special dividend, the bank may declare a dividend if the bank transfers 10 percent of its net income for the preceding two quarters to capital surplus.

(b) *Earnings limitation.* For purposes of 12 U.S.C. 60, a national bank may not declare a dividend if the total amount of all dividends (common and preferred), including the proposed dividend, declared by the national bank in any calendar year exceeds the total of the national bank's retained net income of that year to date, combined with its retained net income of the preceding two years, unless the dividend is approved by the OCC. A national bank shall submit a request for OCC approval of a dividend under 12 U.S.C. 60 to the appropriate supervisory office.

(c) *Surplus surplus.* Any amount in capital surplus in excess of capital stock required by 12 U.S.C. 60(a) (referred to as "surplus surplus") may be transferred to undivided profits and available as dividends, provided:

(1) The bank can demonstrate that the surplus came from earnings of prior periods, excluding the effect of any stock dividend; and

(2) The board of directors of the bank approves the transfer of the surplus surplus from capital surplus to undivided profits.

[61 FR 60363, Nov. 27, 1996, as amended at 64 FR 60098, Nov. 4, 1999]

§ 5.65 Restrictions on undercapitalized institutions.

Notwithstanding any other provision in this subpart, a national bank may not declare or pay any dividend if, after making the dividend, the national bank would be "undercapitalized" as defined in 12 CFR part 6.

§ 5.66 Dividends payable in property other than cash.

In addition to cash dividends, directors of a national bank may declare dividends payable in property, with the approval of the OCC. Even though the property distributed has been previously charged down or written off entirely, the dividend is equivalent to a cash dividend in an amount equal to the actual current value of the property. Before the dividend is declared, the bank should show the excess of the actual value over book value on the books of the national bank as a recovery, and the dividend should then be declared in the amount of the full book value (equivalent to the actual current value) of the property being distributed.

§ 5.67 Fractional shares.

To avoid complicated recordkeeping in connection with fractional shares, a national bank issuing additional stock by stock dividend, upon consolidation or merger, or otherwise, may adopt arrangements such as the following to preclude the issuance of fractional shares. The bank may:

(a) Issue scripts or warrants for trading;

(b) Make reasonable arrangements to provide those to whom fractional shares would otherwise be issued an opportunity to realize at a fair price upon the fraction not being issued through its sale, or the purchase of the additional fraction required for a full share, if there is an established and active market in the national bank's stock;

(c) Remit the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The cash equivalent is based on the market value of the stock, if there is an established and active market in the national bank's stock. In the absence of such a market, the cash equivalent is based on a reliable and

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disinterested determination as to the fair market value of the stock if such stock is available; or

(d) Sell full shares representing all the fractions at public auction, or to the highest bidder after having solicited and received sealed bids from at least three licensed stock brokers. The national bank shall distribute the proceeds of the sale *pro rata* to shareholders who otherwise would be entitled to the fractional shares.

Subpart F—Federal Branches and Agencies

§ 5.70 Federal branches and agencies.

(a) *Authority.* 12 U.S.C. 93a and 3101 *et seq.*

(b) *Scope.* This subpart describes the filing requirements for corporate activities and transactions involving Federal branches and agencies of foreign banks. Substantive rules and policies for specific applications are contained in 12 CFR part 28.

(c) *Definitions.* For purposes of this subpart:

(1) To *establish* a Federal branch or agency means to:

(i) Open and conduct business through an initial or additional Federal branch or agency;

(ii) Acquire directly, through merger, consolidation, or similar transaction with another foreign bank, the operations of a Federal branch or agency that is open and conducting business;

(iii) Acquire a Federal branch or agency through the acquisition of a foreign bank subsidiary that will cease to operate in the same corporate form following the acquisition;

(iv) Convert a state branch or state agency operated by a foreign bank, or a commercial lending company controlled by a foreign bank, into a Federal branch or agency;

(v) Relocate a Federal branch or agency within a state or from one state to another; or

(vi) Convert a Federal agency or a limited Federal branch into a Federal branch.

(2) *Federal branch* includes a limited Federal branch unless otherwise provided.

(d) *Filing requirements*—(1) *General.* Unless otherwise provided in 12 CFR

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part 28, a Federal branch or agency shall comply with the applicable requirements of this part.

(2) *Applications.* A foreign bank shall submit an application and obtain prior approval from the OCC before it:

(i) Establishes a Federal branch or agency; or

(ii) Exercises fiduciary powers at a Federal branch. A foreign bank may submit an application to exercise fiduciary powers at the time of filing an application for a Federal branch license or at any subsequent date.

[61 FR 60363, Nov. 27, 1996, as amended at 68 FR 70698, Dec. 19, 2003]

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AUTHORITY: 12 U.S.C. 93a, 1831o.

SOURCE: 57 FR 44891, Sept. 29, 1992, unless otherwise noted.

Subpart A—Capital Categories

§ 6.1 Authority, purpose, scope, and other supervisory authority.

(a) *Authority.* This part is issued by the Office of the Comptroller of the Currency (OCC) pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act) as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102-242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).